UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CARLO CAVALLO, individually and on behalf of all others similarly situated, Plaintiff, v. UBER TECHNOLOGIES, INC. and RASIER, LLC, Defendants.	§ § § § § § § § § § §	No. 2:16-cv-4264-FLW-DEA MOTION DAY: December 5, 2016

CARLO CAVALLO'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

Dated: November 21, 2016

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Carlo Cavallo respectfully submits this memorandum of law in opposition to Uber Technologies, Inc. and Rasier, LLC's (collectively, "Uber") motion to compel arbitration.

PRELIMINARY STATEMENT

This case is about one thing: thousands of hard-working drivers, like Cavallo, struggling to get by while Uber, a company valued at more than $65 billion, exploits them to bolster its bottom line. Uber likes to call itself a technology company. But Uber sells rides, not software. Uber's drivers are the lifeblood of the company. Nonetheless, to increase profits, Uber misleads and takes advantage of them at every turn. Uber misclassifies drivers as independent contractors to skirt its obligations under the Labor Code, misrepresents that tips are included in drivers' fares so that it can keep a larger percentage of the revenue they generate, and misappropriates money from drivers to line its own pockets. Uber now seeks to prevent drivers from having their day in court.

According to Uber, the Court should dismiss Cavallo's claims because he entered into a labor agreement with a binding arbitration provision. Not so.

The labor agreement's delegation clause—an agreement to arbitrate threshold issues—does not allow drivers to pursue concerted legal action to challenge the enforceability of the arbitration provision, a vital term that governs every aspect of their relationship with Uber. Instead, if drivers wish to challenge this unlawful term, they must do so alone, one by one. The delegation clause is therefore unenforceable on two grounds: (1) it violates the National Labor Relations Act ("NLRA"), which makes it unlawful for employers to interfere with employees' right to engage in concerted activities—including litigating class and collective actions—for their mutual aid and protection; and (2) it violates the Norris-LaGuardia Act, which prohibits courts from enforcing any promise that contravenes the public policy that employees be free from employer interference in pursuing employment-related concerted activities, including taking legal action.

The delegation clause is also unenforceable as a matter of basic contract law principles because it is buried in the arbitration provision—it is one sentence in an arbitration provision that spans five pages of a nineteen-page agreement.

Once the Court invalidates the delegation clause, it is tasked with evaluating the arbitration provision in the drivers' labor agreement. Because the arbitration provision contains a class/collective action waiver that requires drivers to resolve all legal disputes with Uber in arbitration on an individual basis only, and not in a class, collective, or representative action, the arbitration provision is also unenforceable under the NLRA and Norris-LaGuardia.

This action should proceed in Court.

STATEMENT OF FACTS

In 2015, Cavallo accepted the November 10, 2014 version of Uber's Transportation Services Agreement ("TSA").[1]

The TSA's arbitration provision contains a class/collective action waiver, which requires drivers to "resolve any dispute that is in arbitration on an individual basis only, and not on a class, collective action, or . . . representative action basis[.]" (*Id.* § 15.3(v) (emphasis removed). *See also id.* § 15.3 ("[T]his provision will preclude you from bringing any class, collective, or representative action . . . against . . . Uber. It also precludes you from participating in or recovering relief under any current or future class, collective, or representative action brought against . . . Uber by someone else . . . . [Y]ou are agreeing in advance that you will not participate in . . . any such class, collective, and/or representative lawsuit.") (emphasis removed).)

The TSA also has a delegation clause, which requires an arbitrator to decide disputes related to the enforceability and validity of the arbitration provision:

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[1] A copy of the TSA is attached as Exhibit C to the Declaration of Michael Coleman, filed in support of Uber's motion.

> This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action. *Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision*. All such matters shall be decided by an Arbitrator and not by a court or judge.

(*Id.* § 15.3(i) (emphasis added).) The delegation clause does not allow drivers to collectively challenge the enforceability of the arbitration provision. (*Id.*)

The TSA gives drivers 30 days to opt out of arbitration by sending a written notification expressing their intent to Uber, with their name and the date. (*See id.* § 15.3(viii).)

ARGUMENT

I. As the NLRB and courts throughout the country have recently held, arbitration provisions that preclude employees from pursuing concerted legal action against their employer violate the NLRA, regardless of whether employees are given the opportunity to opt out.

As the following well-reasoned decisions make clear, an arbitration provision that prevents employees from engaging in concerted activities for their mutual aid and protection—including from bringing legal action against their employer—violates the NLRA, regardless of whether they have an opportunity to opt out.

A. *On Assignment Staffing Services, Inc.*, 362 NLRB 189, 2015 WL 5113231 (Aug. 27, 2015)

Section 7 of the NLRA provides that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid and protection." 29 U.S.C. § 157. Section 8 makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. 29 U.S.C. § 158(a)(1).

In *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), the NLRB held that an employer violates the NLRA when it imposes, as a condition of employment, an agreement that requires employees to resolve all work-related disputes through individual arbitration. The NLRB reexamined and reaffirmed *D.R. Horton* in *Murphy Oil USA, Inc.*, 361 NLRB 72, 2014 WL 5465454 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, No. 14-cv-60800 (5th Cir. May 13, 2016), *petition for cert. filed*, No. 16-307 (Sept. 9, 2016). In *D.R. Horton*, the NLRB specifically reserved the question of whether an arbitration agreement would violate the NLRA if it contained an opt-out provision and was therefor not a condition of employment. 357 NLRB at 2289 n.28.

Subsequently, the NLRB answered that question in the affirmative in *On Assignment*, where it held "such opt-out agreements unlawful on two separate grounds." 2015 WL 5113231, at *1, *enforcement denied*, No. 15-cv-60642 (5th Cir. June 6, 2016).

First, the NLRB found that "[t]he Agreement's prohibition against the pursuit of class or collective claims violates Section 8(a)(1)" and that "[t]he existence of an opt-out procedure—itself a condition of employment, as part of the Agreement—d[id] not change this fact." *Id.* at *5. "Section 8(a)(1)'s reach is not limited to employer conduct that completely prevents the exercise of Section 7 rights. Instead, the long-established test is whether the employer's conduct *reasonably tends* to *interfere* with the free exercise of employee rights under the Act." *Id.* (emphasis in original).

According to the NLRB, the opt-out procedure interfered with employees' Section 7 rights in at least two ways. *Id.* The procedure "requir[ed] employees to take affirmative steps" to retain their rights by opting out, which burdens the exercise of those rights. *Id.* at *5-6. The NLRB also found that the procedure compelled employees "to make an observable choice that demonstrates their support for or rejection of concerted activity." *Id.* (quotation marks omitted). "Th[e] 'right to remain silent . . . to protect the secrecy' of employees' views concerning unions applies equally to the Section 7 right to engage in concerted activity." *Id.* (quoting *Stoner Lumber, Inc.*, 187 NLRB 923, 930 (1971), *enforced*, 1972 WL 3035 (6th Cir. 1972)).

In other words, the opt-out procedure was unlawful because it "require[d] that employees choose one of two options. They can become bound by the unlawful Agreement—and forever waive their Section 7 rights—by doing nothing. Or employees can notify the[ir] [employer] that they have elected to opt out of the unlawful Agreement and thus, retain the ability to exercise rights fundamental to the Act." *Id.* at *7. This type of "mandatory opt-out procedure interferes with employees' Section 7 rights by effectively putting them in the position of having either to accept or reject the[ir] [employer's] clearly preferred course of action." *Id.* (quotation marks and text alteration omitted). The court noted that the opt-out procedure, which is materially indistinguishable from that in the TSA, was particularly egregious because it "amplified" the "unlawful interference" by compelling employees to make an "observable choice." *Id.*

Second, the NLRB found that "even assuming . . . that the opt-out provision renders the arbitration agreement not a condition of employment, it is still unlawful because it requires employees to prospectively waive their Section 7 right to engage in concerted activity." *Id.* at *1. "It is well established, as the Board observed in *D.R. Horton*, that employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA." *Id.* at *8 (quotation marks omitted). "Any binding agreement that precludes individual employees from pursuing protected concerted legal activity in the future amounts to a prospective waiver of Section 7 rights—*rights that may not be traded away* . . . —and thus is contrary the Act." *Id.* (emphasis added). *See also id.* at *11 ("[W]e would reach the same result even if the Respondent had permitted employees entirely to reject its Agreement in the first instance, with no consequences for their employment.").

Finally, the NLRB found no conflict with the FAA for the same reasons it explained in *D. R. Horton*, as reaffirmed in *Murphy Oil*: (1) "the NLRA Section 7 right to pursue joint, class, or collective legal action is a substantive right, and not merely a procedural right of the sort found in other statutes, and which arbitration agreements may effectively waive under the FAA"; and (2) "not only does the text of the FAA fail to establish that an arbitration agreement inconsistent with the NLRA is nevertheless enforceable, but the savings clause in Section 2 of the FAA affirmatively provides that such a conflict with federal law is grounds for invalidating the agreement[.]" *Murphy Oil USA, Inc.*, 2014 WL 5465454, at *7.

Thus, in *On Assignment*, the NLRB has reasonably construed the NLRA to find that an arbitration agreement that waives an employee's right to pursue collective litigation is unlawful even if it contains an opt-out provision. Under established administrative law principles, now that the NLRB has exercised its statutory authority to interpret the NLRA, the Court's review of the agency's expert statutory interpretation is governed by the deferential framework established in *Chevron*. *See, e.g.*, *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 409 (1996) ("[W]e stress that the reviewing court's function is limited. For the Board to prevail, it need not show that its construction is the *best* way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one.") (emphasis in original; quotation marks, citations, and text alterations omitted); *N.L.R.B. v. FedEx Freight, Inc.*, 832 F.3d 432, 439 (3d Cir. 2016) ("[T]he Board may craft rules through rulemaking or adjudication. Because these rules interpret the NLRA, they are subject to the principles of *Chevron* . . . Under *Chevron*, if Congress has not spoken to the precise question at issue and the statute is silent or ambiguous with respect to the specific issue, the question for the reviewing court is whether the agency's answer is based on a permissible construction of the statute. Reviewing courts must respect the judgment of the agency empowered to apply the law to varying fact patterns, even if the issue with nearly equal reason might be resolved one way rather than another.") (quotation marks, citations, and text alterations omitted); *Allegheny Ludlum Corp. v. N.L.R.B.*, 301 F.3d 167, 174–75 (3d Cir. 2002) ("We must defer to the requirements imposed by the Board if they are rational and consistent with the National Labor Relations Act, and if the Board's explication is not inadequate, irrational or arbitrary . . . . We must uphold the NLRB's construction of the NLRA if it is reasonably defensible.") (quotation marks, citations, and text alterations omitted).

B. *Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016)*

In *Lewis*, authored by Chief Judge Wood, the Seventh Circuit held that an employment agreement that does "not permit collective arbitration or collective action in any other forum . . . violates the [NLRA] and is also unenforceable under the [FAA]." *Lewis*, 823 F.3d at 1151.

First, the Seventh Circuit noted that Section 7's "'concerted activities' have long been held to include 'resort to administrative and judicial forums.'" *Id.* at 1152 (quoting *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 566 (1978)). *See also Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980 (9th Cir. 2016) (Thomas, C.J.) ("This case turns on a *well-established principle*: employees have the right to pursue work-related legal claims together.") (emphasis added; quotation marks and citations omitted). "[E]ven if Section 7 *were* ambiguous—and it is not—the Board . . . has interpreted Sections 7 and 8 to prohibit employers from making agreements with individual employees barring access to class or collective remedies." *Lewis*, 823 F.3d at 1153 (emphasis in original). "The Board's interpretations of ambiguous provisions of the NLRA are entitled to judicial deference." *Id.* (quotation marks omitted).

The court quickly dispensed with defendant's argument that the NLRA could not have meant to protect employees' right to class remedies because Rule 23 did not exist when the NLRA was passed in 1935:

> There is no reason to think that Congress intended the NLRA to protect only "concerted activities" that were available at the time of the NLRA's enactment. Second, the contract here purports to address *all* collective or representative procedures and remedies, not just class actions. Rule 23 may have been yet to come at the time of the NLRA's passage, but it was not written on a clean slate. Other class and collective procedures had existed for a long time on the equity side of the court . . . Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA. The plain language of Section 7

> encompasses them, and there is no evidence that Congress intended them to be excluded. Section 7's plain language controls and protects collective legal processes.

Id. at 1154 (emphasis in original; citation omitted). *See also id.* at 1160-61 ("Rule 23 is not the source of the collective right here; Section 7 of the NLRA is."); *Morris*, 834 F.3d at 982 n.3 ("[W]e reject the argument that the NLRA cannot protect a right to concerted legal action because Rule 23 class actions did not exist until after the NLRA was passed. Rule 23 is not the source of employee rights; the NLRA is. *Eastex* settles this question by expressly including concerted legal activity within the set of protected § 7 activities.") (citation omitted).[2]

Because "concerted activities" includes filing legal actions, the Seventh Circuit held that an arbitration provision that "prohibits collective action" is unenforceable because it "violates Sections 7 and 8 of the NLRA." *Lewis*, 823 F.3d at 1156.

Second, the Seventh Circuit found that the NLRA and FAA do not conflict. Indeed, under binding Supreme Court precedent, the two statutes must be read in harmony to preclude the enforcement of an arbitration provision that prevents employees from vindicating their rights in collective actions:

> Epic argues that the NLRA contains no "contrary congressional command" against arbitration, and that the FAA therefore trumps the NLRA. But this argument puts the cart before the horse. Before we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all . . . . Epic must overcome a heavy presumption to show that the FAA clashes with the NLRA. When two statutes are capable of co-existence it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Moreover, when two statutes complement each other—that is, each has its own scope and purpose and imposes different requirements and protections—finding that one precludes the other would flout the congressional design. Courts will harmonize overlapping statutes so long as each reaches some distinct cases. Implied repeal should be found only when there is an irreconcilable conflict between the two federal statutes at issue. Epic has not carried that burden, because there is no conflict between the NLRA and the FAA, let alone an irreconcilable one. As a general matter, there is no doubt that illegal promises will not be enforced in cases controlled by the federal law. The FAA incorporates that principle through its saving clause: it confirms that agreements

[2] The Court should similarly reject any argument from Uber on reply that Section 7 does not extend to class litigation because the NLRA was enacted before Rule 23.

> to arbitrate shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. Illegality is one of those grounds . . . . Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement. Here, *the NLRA and FAA work hand in glove*.

Id. at 1157 (emphasis added; quotation marks, citations, and text alterations omitted). *See also Morris*, 834 F.3d at 985 ("When an illegal provision not targeting arbitration is found in an arbitration agreement, the FAA treats the contract like any other; the FAA recognizes a general contract defense of illegality.").

The Seventh Circuit also rejected the argument "that even if the NLRA does protect a right to class or collective action, any such right is procedural only, not substantive, and thus the FAA demands enforcement." *Lewis*, 823 F.3d at 1160. "The right to collective action in section 7 of the NLRA is not . . . merely a procedural one. It instead lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute." *Id.* ("That Section 7's rights are 'substantive' is plain from the structure of the NLRA: Section 7 is the NLRA's *only* substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects.") (emphasis in original). "The Supreme Court has held that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). "Arbitration agreements that act as a prospective waiver of a party's *right to pursue* statutory remedies—that is, of a substantive right—are [therefore] not enforceable." *Id.* (emphasis in original; quotation marks omitted). *See also Morris*, 834 F.3d at 986 ("The rights established in § 7 of the NLRA—including the right of employees to pursue legal claims together—are substantive. They are the central, fundamental protections of the Act, so the FAA does not mandate the enforcement of a contract that alleges their waiver.").

Third, though the agreement at issue did not permit employees to opt out of arbitration, the Seventh Circuit thoroughly distinguished another decision that allowed an opt-out provision to resuscitate an otherwise invalid class action waiver:

> The Ninth Circuit has held that an arbitration agreement mandating individual arbitration may be enforceable where the employee had the right to opt out . . . The Ninth Circuit's decision in *Johnmohammadi* [*v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014)] conflicts with a much earlier decision from this court, which held that contracts between employers and individual employees that stipulate away Section 7 rights necessarily interfere with employees' exercise of those rights in violation of Section 8. *See N.L.R.B. v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). *Stone*, which has never been undermined, held that where the "employee was obligated to bargain individually," an arbitration agreement limiting Section 7 rights was a *per se* violation of the NLRA and could not "be legalized by showing the contract was entered into without coercion." *Id.* The Board has long held the same . . . . (In *Johnmohammadi*, the Ninth Circuit, without explanation, *did not defer to the Board.*)[3]

Lewis, 823 F.3d at 1155 (emphasis added; quotation marks and citations omitted). *See also id.* at 1159 ("Epic acted unlawfully in *attempting* to contract with Lewis to waive his Section 7 rights, *regardless of whether Lewis agreed to that contract*. The very formation of the contract was illegal.") (emphasis added). Thus, it is crystal clear that the presence of an opt-out provision would not change the result in *Lewis*. *See also Morris*, 834 F.3d at 982 ("A separate proceedings clause . . . prevents the initiation of any concerted work-related legal claim, in any forum. Preventing the exercise of a § 7 right strikes us as interference within the meaning of § 8 . . . . And an employer violates § 8 *a second time* by conditioning employment on signing a concerted action waiver.") (emphasis added; quotation marks, citation, and text alterations omitted); *id.* at 991 ("§ 7 of the National Labor Relations Act (NLRA) *precludes employees from waiving the right* to arbitrate their disputes collectively") (dissent) (emphasis added).

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[3] *Johnmohammadi*—which Uber cites (Uber Br. 14 n.7)—was decided before *On Assignment*. Because *Johnmohammadi* did not state that Section 8(a)(1) is unambiguous or that the statute leaves no room for agency interpretation, the NLRB's decision in *On Assignment* is entitled to *Chevron* deference even in the Ninth Circuit. *See, e.g.*, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself . . . . Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.") (emphasis added). Other Ninth Circuit cases touching on whether an opt-out right saves an otherwise unlawful arbitration provision did so only in dicta. *Morris* did not involve an opt-out provision. And the argument was waived in *Mohamed v. Uber Technologies Inc.* 836 F.3d 1102, 1111 n.6 (9th Cir. 2016) ("We note that Plaintiffs also raised the argument that the class and collective action waivers in the arbitration agreements may violate the National Labor Relations Act (NLRA) for the first time in a sur-reply. That untimely submission waived the argument.").

Finally, the Seventh Circuit thoroughly distinguished other contrary precedent. With regard to the Fifth Circuit's decision in *D.R. Horton*, which miscited *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), the court noted that "[t]here are several problems with [the Fifth Circuit's] logic," including that it never made any "effort to harmonize the FAA and NLRA." *Lewis*, 823 F.3d at 1158. "When addressing the interactions of federal statutes, courts are not supposed to go out *looking* for trouble: they may not pick and choose among congressional enactments." *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) (emphasis in original; quotation marks omitted). "Rather, they must employ a strong presumption that the statutes may both be given effect." *Id.*

The Seventh Circuit similarly addressed decisions from the Second, Eighth, and Ninth Circuits:

> Epic warns us against creating a circuit split, noting that at least two circuits agree with the Fifth. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (rejecting argument that there is inherent conflict between NLRA/Norris LaGuardia Act and FAA); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n. 8 (2d Cir. 2013) (rejecting NLRA-based argument without analysis); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n. 3 (9th Cir. 2013) (noting "[w]ithout deciding the issue" that a number of courts have "determined that they should not defer to the NLRB's decision in *D.R. Horton*"). *Of these courts, however, none has engaged substantively with the relevant arguments.*

Lewis, 823 F.3d at 1159–60 (emphasis added).[4]

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[4] Though Uber will likely claim in its reply that the majority of courts support its position, it is important to note that the vast majority of post-*Lewis* decisions do not. Indeed, most district courts that have addressed the issue since *Lewis* in circuits without contrary binding precedent have adopted the reasoning of the Seventh Circuit. This Court should do the same.

C. *In re Fresh & Easy LLC*, No. 15-cv-12220 (BLS), 2016 WL 5922292 (D. Del. Oct. 11, 2016)

In *Fresh & Easy*, the court granted proper deference to the NLRB's decision in *On Assignment* and applied the reasoning from *Lewis* to invalidate an arbitration agreement that contained a 30-day opt-out provision and a class action waiver requiring plaintiff to bring suit in her individual capacity only, not as a plaintiff or member in any class, representative, or collective action. 2016 WL 5922292, at *2.

First, the court concluded that "Section 7 reflects the unambiguous intention of congress to create and protect employees' right to pursue collective legal action." *Id.* at *3. *See also id.* at *5 ("Synthesizing these authorities leads the Court to conclude that the ordinary meaning of 'concerted activities' within the context of Section 7 protects a broad range of employee conduct. Collective adjudication fits well within this protected range . . . Other courts have similarly construed 'concerted activities' as encompassing collective adjudication.") (citing, among other cases, *Lewis*, 823 F.3d at 1153, and *Morris*, 2016 WL 4433080, at *3).

The court also noted that "even if this term [concerted activities] is ambiguous and the Court resorts to the second step of the *Chevron* analysis, the Court's conclusion would remain unchanged." *Id.* at *6. "The Board, on at least two occasions, has interpreted Section 7 to provide a substantive right to class or collective remedies," and that interpretation is "entitled to considerable deference" because it is "rational and consistent with the NLRA's statutory scheme." *Id.*

Second, the court found that "the right of employees to utilize a collective mechanism is a substantive right protected under the NLRA." *Id.* at *7. "Unlike procedural rights that concern the manner and the means by which the litigants' rights are enforced, the right to pursue work-related legal claims on a collective or concerted basis is the very right created and protected under Section 7." *Id.* (quotation marks omitted).

Third, "[t]he FAA's savings clause and the substantive nature of class actions under Section 7 convince[d] the Court that the NLRA and the FAA can coexist." *Id.* at *8. Specifically, "Section 2 of the FAA excepts from the FAA's enforcement grasp those contracts where a valid contract defense applies." *Id.* at *9. As such, "[a]n illegal class waiver in an arbitration agreement fits squarely under the ambit of Section 2." *Id.* "Consequently, the FAA's savings clause operates to avoid any conflict with the NLRA." *Id.* "To find otherwise would render the FAA's savings clause a nullity, since illegality is a generally applicable contract defense justifying revocation of the contract." *Id.*

The court also found that the FAA is not an obstacle because the illegality of the class waiver had nothing to do with the designation of arbitration as the forum:

> As the Ninth Circuit cogently described in *Morris*[,] "[i]t would equally violate the NLRA for [the employer] to require its employees to sign a contract requiring the resolution of all work-related disputes *in court* and in 'separate proceedings.' The same infirmity would exist if the contract required disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to that mechanism and (2) required separate individual proceedings."

Id. at *7-8 (quoting *Morris*, 2016 WL 4433080, at *6) (emphasis in original).

Fourth, the court addressed defendant's "mistaken[] assert[ion] that the Supreme Court's FAA jurisprudence dictates a contrary result." *Id.* at *9. For example, defendant cited *Concepcion* and *DirecTV v. Imburgia*, 136 S. Ct. 463 (2015), for the proposition that agreements to arbitrate under the FAA can require legal claims to be adjudicated on an individual basis. *Id.* "Contrary to *Concepcion*, the invalidation of class waivers pursuant to the NLRA does not rest on defenses that apply only to arbitration. The NLRA has equal application outside of the arbitration context." *Id.* (quotation marks and citations omitted). "*Imburgia* was a contract interpretation case[.]" *Id.* at *10 (quotation marks and citations omitted).

In fact, prior Supreme Court precedent "has *repeatedly* found that the FAA does *not* require enforcement of an arbitration agreement that waives a party's substantive rights." *Id.* at *9 (emphasis added). *See also id.* at *10 ("The FAA has *never* been held to deny a party a substantive right provided for under a federal statute. And the statutes can be harmonized by application of the FAA's savings clause.") (emphasis added; citation omitted); *Morris*, 834 F.3d at 987-88 (distinguishing Supreme Court decisions in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); and *Italian Colors*, as addressing "*procedural* rights," whereas the rights in Section 7 are substantive) (emphasis in original).

Finally, defendant cited to *Johnmohammadi* in support of its argument that the right to opt out rendered the arbitration provision enforceable. *See Fresh & Easy*, 2016 WL 5922292, at *2. As in *Lewis*, the court disagreed: "Without a reference to any Board decision or discussion of *Chevron* deference, the Ninth Circuit in *Johnmohammadi* held that an arbitration agreement requiring individual arbitration is enforceable where the employee could opt[]out of the agreement." *Id.* (footnote omitted). Instead of following *Johnmohammadi*, the court properly deferred to the NLRB's decision in *On Assignment*:

> Applying the *Chevron* rubric . . . , the Court must first determine whether Congress has directly spoken on this issue. Congressional intent is discerned from the statutory text. The operative words under Section 8 are "interfere with, restrain, and coerce." The Court cannot say Section 8(a)(1) plainly renders invalid all class waivers when an employee can opt out . . . . The Court concludes that Section 8(a)(1) is susceptible to two plausible constructions, and we therefore turn to the second step of *Chevron.* As noted, the Court *must* defer to the Board's interpretation so long as it is rational and consistent with the NLRA. In *On Assignment* . . . , the Board interpreted Section 8 and held that barring collective legal action reasonably tends to interfere with the free exercise of employee rights under the NLRA. The Board's interpretation of Section 8(a)(1) is reasonable and consistent with the NLRA's purpose . . . . The Court finds no reason to disregard the Board's interpretation of Section 8(a)(1) and will follow its interpretation. Therefore, the fact that the Plaintiff was given an opportunity to opt out of the Arbitration Agreement does not alter the Court's determination that the Class Waiver is unenforceable.

Id. at *11-12 (emphasis added; quotation marks, citations, and text alterations omitted).[5]

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[5] The only other post-*Lewis* decision by a district court in the Third Circuit, *Kobren v. A-1 Limousine Inc.*, No. 16-cv-516-BRM-DEA, 2016 WL 6594075 (D.N.J. Nov. 7, 2016) (Martinotti, J.), did not properly defer to the NLRB and decided to follow the Fifth Circuit. As mentioned in *Kobren*, the

D. *Curtis v. Contract Management Services*, No. 1:15-cv-487-NT, 2016 WL 5477568 (D. Me. Sept. 29, 2016)

In *Curtis*, despite the presence of a 30-day opt-out provision, the court applied *Lewis* and *On Assignment* to strike down an agreement that required plaintiff to bring any dispute in arbitration on an individual basis only and not on a class, collective, or representative basis. 2016 WL 5477568 at *1-2.

The court initially addressed its decision to follow *Lewis*, which hinged on the Seventh Circuit's correct determination that Section 7's rights are substantive, not procedural:

> The disagreement [between the circuits] centers largely on whether Section 7's right to engage in collective activity is considered a substantive right or a procedural one. The Fifth Circuit, in rejecting the NLRB's conclusion, reasoned that a Rule 23 class action is a procedural device used to bring substantive claims rather than a substantive right in and of itself . . . . Since neither the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA, the Fifth Circuit concluded that the class action waiver was enforceable as part of the agreement between the parties. In contrast, the Seventh Circuit in *Lewis* pointed out that the right to engage in collective action lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve when it enacted the NLRA . . . . The Ninth Circuit [in *Morris*] likewise found that Section 7 of the NLRA established substantive rights . . . . The distinction is critical because substantive rights cannot be waived in an arbitration agreement. Having concluded that the class action waivers were illegal under the NLRA, it was a short step for the Seventh and Ninth Circuits to find that the waivers were unenforceable under the FAA's savings clause. I agree with the Seventh and Ninth Circuits.

Id. at *4 (quotation marks, citations, and text alterations omitted).

The court then deferred to the NLRB's decision in *On Assignment* to hold that the opt-out provision did not save the arbitration agreement:

> The NLRB's decision on opt-out provisions is entitled to judicial deference. Because the NLRB is charged with administering the NLRA and because Congress did not directly address whether a class action waiver with an opt-out provision constitutes interference under Section 8, the NLRB's decision on this point is entitled to deference under the *Chevron* doctrine as long as it is based on a permissible construction of the NLRA . . . . I find that the

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Third Circuit held oral argument in *NLRB v. The Rose Group*, Nos. 15-4092, 16-1212, an appeal that implicates these issues, on October 5, 2016. *Id.* at *4 n.7. Like in *Kobren*, the Court should not stay this action pending a decision from the Third Circuit. *Id.* at *5.

> NLRB's interpretation of the NLRA on this issue to be not only permissible but *eminently reasonable*. Accordingly, I will defer to the NLRB's interpretation.

Id. at *6 (emphasis added; quotation marks and citations omitted).

E. *Tigges v. AM Pizza, Inc.*, No. 16-cv-10136-WGY, 2016 WL 4076829 (D. Mass. July 29, 2016)

In *Tigges*, the court applied *Lewis* and *On Assignment* to invalidate an arbitration agreement that contained a class and collective action waiver, regardless of plaintiff's ability to opt out. 2016 WL 4076829, at *13-16.

First, the court distinguished contrary Fifth Circuit precedent and found that the right to engage in concerted action for mutual aid or protection under Section 7 is a substantive right that includes filing a class action lawsuit:

> Employees filing a lawsuit together exemplifies protected concerted action . . . Ruling from the bench on May 23, 2016, this Court explained that the class action waiver at issue here impermissibly infringed upon this right, since the very essence of labor rights under the National Labor Relations Act is collective action. Days later, the Seventh Circuit, in a major decision written by Chief Judge Diane Wood, issued an opinion [in *Lewis*] similarly refusing to enforce an arbitration agreement that would have precluded employees protected by the NLRA from bringing a class action lawsuit. The opinion brought the Seventh Circuit into conflict with the Fifth, Eighth, and Second Circuits. The Fifth Circuit's opinion [in *D.R. Horton*] is the most comprehensive of the three going the other way, and offers a useful starting point for the analysis. It ruled that the use of class action procedures is not a substantive right, but rather is merely a procedural method for vindicating rights that have their source elsewhere. The Court disagrees with this legal conclusion, for largely the reasons articulated by Judge Wood in *Lewis*.

Id. at *13 (quotation marks, citations, and text alterations omitted).[6]

Second, the court determined that the FAA does not conflict with the NLRA:

> If enforcing this agreement is required by the FAA, yet violates the substantive rights conferred on employees by the NLRA, then the Court would need to mediate a conflict between federal statutes. The Court, however, rules that there is in fact no conflict, because the FAA does not require enforcement of the class action waiver here. To be sure, the . . . Defendant's argument commended itself to the Fifth Circuit, which held that the NLRB's

[6] As every decision in this section and binding supreme court precedent, *see, e.g.*, *Eastex, Inc.*, 437 U.S. at 566, demonstrate, pursuing claims collectively in litigation is a concerted activity protected by the NLRA. The Court should reject any contrary argument from Uber on reply.

> interpretation of the NLRA (which is identical to the Court's) conflicted with the FAA. This argument misinterprets the FAA, however.

Id. at *14 (citation omitted).

Finally, in addressing the opt-out provision, the court found that the "NLRA's Section 7 rights are *not waivable by individual employees*." *Id.* at *16 (emphasis added). Importantly, "[a] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Id.* (quotation marks and text alteration omitted). According to the court,"[i]n enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *Id.* (quotation marks and text alterations omitted).

The court also granted proper deference to the NLRB's decision in *On Assignment*. "[C]ertainly, the NLRB's interpretation of Section 7—that these agreements, *even with opt-out provisions*, burden the exercise of Section 7 rights, and unlawfully require employees to prospectively waive their Section 7 right to engage in concerted activity— is a reasonable one, in light of the statute's text and purpose." *Id.* (emphasis added; quotation marks, citation, and text alterations omitted).

II. Arbitration provisions that preclude employees from pursuing concerted legal action against their employer also violate the Norris-LaGuardia Act.

Under the Norris-LaGuardia Act, courts cannot enforce promises—in the form of an agreement or otherwise—that interfere with employees' right to pursue class and collective litigation.

Section 2 of Norris-LaGuardia expressly declares it to be the "public policy of the United States" that employees are entitled to be free from employer "interference" or "restraint" when they engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 102. "This section of the Norris-LaGuardia Act expresses Congress' recognition of the right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, *and the welfare of labor* *generally*[.]" *Eastex*, 437 U.S. at 565 n.14 (emphasis in original; quotation marks omitted). Section 3 states that "[a]ny undertaking or promise" contrary to the policy declared in Section 2 "shall not be enforceable in any court of the United States." 29 U.S.C. § 103. Together, these sections preclude enforcement of a class/collective action waiver in an arbitration provision, because, as the cases cited above make clear, class or collective legal proceedings are "concerted activities."

Sections 4 and 13 provide further support for the conclusion that Congress intended Norris-LaGuardia to protect a broad range of concerted activity, including judicial actions. Section 4 expressly applies to litigation:

> No court of the United States shall have jurisdiction to issue any . . . injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
> * * *
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is . . . *prosecuting[] any action or suit in any court of the United States or of any State*;
> * * *
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified.

29 U.S.C. § 104 (emphasis added). Section 13 defines "labor dispute" to include "*any controversy* concerning terms or conditions of employment." 29 U.S.C. § 113 (emphasis added).

Just as Norris-LaGuardia prohibits enforcement of a promise not to form a union or not to join with co-workers in contesting workplace conditions, so does it prohibit enforcement of a promise not to join with co-workers in a judicial action in an effort to be paid wages that are legally owed.

Thus, under Norris-LaGuardia's plain statutory language, any agreement that prevents employees from taking concerted legal action is unenforceable. *See, e.g.*, *Totten v. Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243, 1258 (C.D. Cal. 2016) ("Viewed in tandem, Sections 2, 3, 4, and 13 of the Norris–LaGuardia Act prevent a federal court from enforcing any undertaking or promise that contravenes the public policy that employees be free from employer interference in concerted activities for the purpose of mutual aid or protection, such as pursuing employment-related collective legal action. The Norris–LaGuardia Act makes KBR's class action waiver, imposed as a condition of employment, unenforceable—such waivers constitute promises or undertakings that prevent employees from acting in concert with their coworkers to vindicate their workplace rights in court or in arbitration."). As such, Norris-LaGuardia interacts with the FAA in the same manner as the NLRA.[7]

III. The delegation clause is unenforceable.

The delegation clause is unenforceable for two reasons: (1) it violates the NLRA and Norris-LaGuardia; and (2) it violates basic contract law principles because it is buried in the arbitration provision.

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[7] There is no conflict between the FAA and the NLRA or Norris-LaGuardia. But even if there was a direct conflict, the Supreme Court has instructed that in the rare case of an "irreconcilable" statutory conflict, the later-enacted statute controls. *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). Not only were Norris-LaGuardia (1932) and the NLRA (enacted in 1935 and substantively and significantly amended in 1947, 1959, and 1974) adopted after the FAA (1925), Norris-LaGuardia expressly provides that "[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed." 29 U.S.C. § 115. *See also Murphy Oil USA, Inc.*, 2014 WL 5465454, at *7 ("[E]ven if there were a direct conflict between the NLRA and the FAA, the Norris-LaGuardia Act—which by its terms prevents enforcement of any private agreement inconsistent with the statutory policy of protecting employees' concerted activity, including an agreement that seeks to prohibit a 'lawful means [of] aiding any person participating or interested in a' lawsuit arising out of a labor dispute—indicates that the FAA would have to yield insofar as necessary to accommodate Section 7 rights."). Although some courts have cited the 1947 recodification of the FAA in concluding that Congress intended the FAA to trump any inconsistent provisions in the NLRA and Norris-LaGuardia, *see, e.g.*, *Owen*, 702 F.3d at 1053, the legislative history of the FAA's recodification makes clear that no substantive change was made or intended. *See* H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (1947 recodification made "no attempt" to amend existing law); H.R. Rep. No. 80-225 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same). Recodification by itself is not a substantive amendment. *See, e.g., Finley v. United States*, 490 U.S. 545, 554 (1989). To that point, the Supreme Court has held for purposes of applying the general principle that a later-enacted statute takes precedence in cases of irreconcilable statutory conflict that a non-substantive reenactment is not considered a later enactment. *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). Thus, even if Congress in enacting Norris-LaGuardia had not expressly repealed all laws in conflict with its provisions, the NLRA (which was amended multiple times after the FAA was reenacted) and Norris-LaGuardia would still take precedence over the 1925 FAA *if* there were an actual conflict.

A. The delegation clause is unenforceable under the NLRA and Norris-LaGuardia because it does not allow drivers to pursue concerted legal action to challenge the validity of the arbitration provision.

Because there is no contrary binding Third Circuit precedent, the Court is free to follow the well-reasoned decisions discussed above. Notably, the Second Circuit, which, along with the Fifth and Eighth Circuits, has adopted a contrary position, has signaled that it might change course and follow *Lewis* if given the chance to "writ[e] on a clean slate." *See Patterson v. Raymours Furniture Co., Inc.*, No. 15-cv-2820, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016) ("If we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the EAP's waiver of collective action is unenforceable. But we are bound by our Court's decision in *Sutherland v. Ernst & Young LLP*, which aligns our Circuit on the other side of the split . . . . We are bound by that holding until such time as it is overruled either by an en banc panel of our Court or by the Supreme Court.") (quotation marks and text alterations omitted).[8]

This Court *is* writing on a clean slate and should seize the opportunity to find that the delegation clause is unenforceable under the NLRA and Norris-LaGuardia, regardless of whether drivers have an opportunity to opt out, because it does not permit drivers to band together to challenge the "enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision." (TSA § 15.3(i).) Instead, if drivers want to contest this term, a key provision of the labor agreement that governs every aspect of their relationship with Uber, they must do so individually, one by one.

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[8] Another district court has predicted that the Sixth Circuit and Supreme Court will align with *Lewis*. *See Gaffers v. Kelly Servs., Inc.*, No. 16-cv-10128, 2016 WL 4445428, at *8 (E.D. Mich. Aug. 24, 2016) ("The Sixth Circuit has not directly addressed the question, and neither has the Supreme Court. However, their decisions nearest the issue strongly suggest that when they do, their answer will be nearer that of the Seventh Circuit in *Lewis* than it will be to the reasoning of those courts of appeals that have adopted the contrary rule.").

"The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 70 (quotation marks omitted). As the cases cited above make clear, one such ground for revocation is illegality. *See, e.g.*, *Lewis*, 823 F.3d at 1157 ("As a general matter, there is no doubt that illegal promises will not be enforced in cases controlled by the federal law. The FAA incorporates that principle through its saving clause[.]").

Under the Supreme Court's severability rule, Cavallo must "challenge[] the delegation provision specifically," not the validity of the labor agreement or arbitration provision as a whole. *Rent-A-Ctr.*, 561 U.S. at 72. Put differently, the severability rule "require[s] the basis of [the] challenge to be directed specifically to the [delegation clause] before the court will intervene." *Id.* at 71. In short, the severability rule is "akin to a pleading standard, whereby a party seeking to challenge the validity of a[] [delegation clause] must expressly say so in order to get his dispute into court." *Id.* at 80 "All that matters is whether the party seeking to present the issue to a court has brought a discrete challenge to the validity of the [delegation] clause." *Id.* at 84 (quotation marks, citation, and text alteration omitted).

Cavallo may specifically challenge the enforceability of the delegation clause in two ways: (1) by attacking the delegation clause in isolation; or (2) by arguing that common procedures from the arbitration provision as applied to the delegation clause render the delegation clause unenforceable. *See, e.g.*, *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 74 (2010) ("Jackson's other two substantive unconscionability arguments assailed arbitration procedures called for by the contract—the fee-splitting arrangement and the limitations on discovery—procedures that were to be used during arbitration under *both* the agreement to arbitrate employment-related disputes *and* the delegation provision. It may be that had Jackson challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court.") (emphasis in original).

Here, it is clear that the delegation clause *itself* does not allow Cavallo to pursue concerted legal action with other drivers "to improve terms and conditions of employment," *Eastex*, 437 U.S. at 565–66, by challenging the enforceability of the arbitration provision, a *critical* term in their labor agreement with Uber. (*See* TSA § 15.3(i).) That conclusion is further cemented when considering the effect of the class/collective action waiver (*id.* § 15.3(v)) "*as applied* to the delegation provision." *Rent-A-Ctr.*, 561 U.S. at 74 (emphasis in original). *See also Ryan v. Delbert Servs. Corp.*, No. 5:15-cv-05044, 2016 WL 4702352, at *5 (E.D. Pa. Sept. 8, 2016) ("The wholesale waiver of federal and state law thus dooms both the delegation provision and the arbitration clause, but for different reasons. *See Rent-A-Center*, 561 U.S. at 74 (recognizing that the same arbitration procedures that render an overall arbitration clause invalid may also render a delegation provision invalid when applied to that provision). As applied to the larger arbitration clause, the choice of no law clause would preclude Ryan from effectively vindicating her federal statutory rights' under the Fair Debt Collection Practices Act. As applied to the delegation provision, it would prevent Ryan from challenging the validity of an arbitration agreement that forbids the assertion of her statutory rights.") (quotation marks, other citations, and text alterations omitted).

Accordingly, the delegation clause is unenforceable under the NLRA. *See, e.g.*, *On Assignment*, 2015 WL 5113231, at *8 ("Any binding agreement that precludes individual employees from pursuing protected concerted legal activity in the future amounts to a prospective waiver of Section

7 rights—rights that may not be traded away . . . —and thus is contrary the Act."); *Lewis*, 823 F.3d at 1152 ("concerted activities have long been held to include resort to administrative and judicial forums") (quotation marks omitted); *Morris*, 834 F.3d at 981–82 ("Therefore, a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is concerted activity under § 7 of the National Labor Relations Act. So too is the filing by employees of a labor related civil action."); *Fresh & Easy*, 2016 WL 5922292, at *7 ("[T]he right to pursue work-related legal claims on a collective or concerted basis is the very right created and protected under Section 7."); *Tigges*, 2016 WL 4076829, at *13 ("Employees filing a lawsuit together exemplifies protected concerted action[.]"). Because the delegation clause prevents drivers "from acting in concert with their coworkers to vindicate their workplace rights in . . . arbitration," *Totten*, 152 F. Supp. 3d at 1258, it violates the public policy expressed in Section 2 of Norris-LaGuardia, and the Court should find it unenforceable under that statute as well.[9]

B. The delegation clause is unenforceable as a matter of basic contract law principles because it is buried in the arbitration provision.

The delegation clause is *one sentence* in an arbitration provision that spans *five pages* of a *nineteen-page* agreement. Even if Cavallo read the delegation clause, he would be unlikely to understand its full implications because they only become clear in light of the interaction between it, the arbitration provision, and the forum-selection clause. Whether it is unconscionable, outside the parties' circle of

[9] In the other decisions involving drivers that Uber cites (Uber Br. 11-12), the drivers made no argument regarding, and the courts did not address, whether a delegation clause was unenforceable under the NLRA and Norris-LaGuardia. Moreover, only two decisions even discussed the application of the NLRA to the arbitration provision. In *Lee v. Uber Technologies, Inc.*, the court noted that, "[i]n the absence of a delegation clause, that question [*i.e.*, whether the Class Action Waiver is invalid under the NLRA] would be one for this Court and might well require the denial of the defendants' motion." No. 15-cv-11756, 2016 WL 5417215, at *6 (N.D. Ill. Sept. 21, 2016). With little analysis, the court in *Bruster v. Uber Technologies, Inc.*, followed *Johnmohammadi* instead of *Lewis* because the Uber labor agreement contained an opt-out provision. No. 15-cv-2653, 2016 WL 4086786, at *3 (N.D. Ohio Aug. 8, 2016). As explained above, the court in *Johnmohammadi* failed to grant any deference to the NLRB.

assent, or an unknown term beyond the range of reasonable expectation, the delegation clause is unenforceable as a matter of basic contract law principles.

Indeed, the court in *Ryan* analyzed a much more visible delegation clause—the arbitration provision was only ten paragraphs and the agreement four pages—and came to the same conclusion:

> [T]he delegation provision is unenforceable as a matter of basic contract law principles. *The delegation provision is obscured among ten paragraphs of boilerplate that make up the arbitration clause, and the arbitration clause itself is only one part of the four pages of boilerplate in the loan agreement*. Of course, boilerplate in consumer contracts is routinely enforceable . . . But that does not mean that any term a party may slip into a ream of boilerplate is enforceable, and *the delegation provision is boilerplate at its most pernicious*. A person who takes out a payday loan would not expect that they may be stripped of all of their applicable federal and state rights, and that the person who will decide whether or not that arrangement is valid will be an arbitrator . . . Even if the borrower read the delegation provision, *the borrower would be unlikely to understand its full implications because they only become clear in light of the interaction between the delegation provision, the arbitration clause, and the choice of law provision*. Whether the delegation provision is characterized as unconscionable, *see Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 119-20 (Pa. 2007), outside of the parties' "circle of assent," *see Curtis v. Ryder TRS Inc.*, 43 F. App'x 103, 105-07 (9th Cir. 2002), or an "unknown term [ ] which [was] beyond the range of reasonable expectation," *see* Restatement (Second) of Contracts § 211 cmt. f (Am. Law. Inst. 1981), it is unenforceable.

Ryan, 2016 WL 4702352, at *5 (emphasis added).

Regardless of what label the Court decides to use, it should invalidate the delegation clause.

IV. The arbitration provision is unenforceable because it prevents drivers from bringing employment-related legal claims against Uber on a concerted basis.

Once the Court invalidates the delegation clause, it is responsible for evaluating the enforceability of the arbitration provision. *See, e.g.*, *Ryan*, 2016 WL 4702352, at *6 ("The delegation provision in [the] loan agreement is unenforceable, which means that the Court can proceed to determine whether Delbert can enforce the arbitration clause."). As with the delegation clause, Cavallo must specifically challenge the enforcement of the arbitration provision. *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract . . . unless the challenge is to the arbitration clause itself[.]").

The arbitration provision contains a class/collective action waiver (*see, e.g.*, TSA § 15.3(v)) and opt-out (*see id.* § 15.3(viii)) that are materially *indistinguishable* from the provisions considered in *On Assignment*, *Lewis*, *Morris*, *Fresh & Easy*, *Curtis*, *Tigges*, and *Totten*. Because the waiver prevents drivers from banding together to bring employment-related legal claims against Uber on a class or collective basis, the arbitration provision is unenforceable under the NLRA and Norris LaGuardia for the reasons stated in those decisions, regardless of drivers' ability to opt out of arbitration.

This dispute cannot be arbitrated. It would be inappropriate for Court to sever the class/collective action waiver and order class arbitration for two reasons: (1) the waiver is central to the parties' labor agreement; and (2) excising the waiver and compelling class arbitration is not what the parties' agreed. *See, e.g.*, *Fresh & Easy*, 2016 WL 5922292, at *13 ("[T]he Court finds that the Class Waiver cannot be severed because it was central to the parties' agreement . . . . The Class Waiver provision is one of three sentences, out of the entire arbitration agreement, that is in bold and all capitals . . . . The Court's discretion is also guided by the fact that excising the Class Waiver and compelling arbitration would effectively be requiring class arbitration. Such a requirement fundamentally alters the agreed upon terms.").

V. Uber's misclassification of drivers as independent contractors does not prevent them from relying on the NLRA and Norris-LaGuardia.

The Court should brush aside any argument from Uber on reply that the NLRA and Norris-LaGuardia do not apply because Cavallo is an independent contractor. As other courts have done, the Court should treat Cavallo as an employee for purposes of this motion. *See, e.g.*, *Curtis*, 2016 WL 5477568, at *7 ("One final point must be made. In order for the Plaintiffs to fall within the protection of the NLRA, they must be employees. Because the Complaint asserts that CMS acted as a joint employer of the Plaintiffs, I assume for the sake of this motion that the employer/employee relationship exists."). To do otherwise, would mean that workers challenging their misclassification through the concerted activity of a class or collective action would first have to litigate their employee status and the applicability of the NLRA and Norris-LaGuardia on an individual basis in order to even reach the argument that a class action waiver violates their statutory rights. Intentionally mislabeling its drivers should not shield Uber from a challenge under the NLRA and Norris-LaGuardia. Indeed, if putative employers could avoid these statutes by simply *claiming that* a laborer is not their employee, the NLRA and Norris-LaGuardia would be effectively nullified. It remains to be seen whether drivers, like Cavallo, are, or are not, Uber's employees. In the meantime, the policy rationale undergirding the NLRA and Norris-LaGuardia can only be vindicated if individuals who can colorably claim to be an entity's employees are treated as such.

CONCLUSION

The Court should deny Uber's motion to dismiss because the labor agreement's delegation clause and arbitration provision are unenforceable under the NLRA and Norris-LaGuardia.

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Respectfully submitted,

/s/ Paul B. Maslo

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on November 21, 2016, he electronically filed a copy of the attached via the CM/ECF filing system, which sent notification of such filing to all Filing Users.

/s/ Paul B. Maslo